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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

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11 UNITED STATES OF AMERICA,
12 Plaintiff,
13 v.
14 HUNG VAN HUYNH (1),
15 Defendant.

16 Case No.: 09cr1442-MMA-1
17 Related Case No.: 16cv1769-MMA

18 **ORDER DENYING DEFENDANT'S**
19 **MOTION TO VACATE UNDER 28**
20 **U.S.C. § 2255**

21 [Doc. No. 82]

22 On December 1, 2011, pursuant to a written plea agreement, Defendant Hung Van
23 Hyunh pleaded guilty to count four of a Superseding Indictment for distributing 220.8
24 grams of cocaine, a Schedule II controlled substance, in violation of Title 21, United
25 States Code, section 841(a)(1), and Title 18, section 2. *See* Doc. No. 53. The Court
26 sentenced Defendant on June 4, 2012 to a term of 180 months imprisonment. *See* Doc.
27 No. 64. Defendant filed a successive motion¹ pursuant to 28 U.S.C. § 2255, challenging
28 his classification as a career offender under the United States Sentencing Guidelines in

1 The United States Court of Appeals for the Ninth Circuit granted Defendant's application for
2 authorization to file a successive 2255 motion. *See* Doc. No. 86-1.

1 light of *Johnson v. United States*, 576 U.S. ---, 135 S. Ct. 2551 (2015). See Doc. No. 82.
2 The government filed a response in opposition to Defendant's motion. See Doc. No. 87.

3 In *Johnson*, the Supreme Court held the residual clause in the definition of a
4 "violent felony" in the Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e)(2)(B)
5 ("ACCA"), to be unconstitutionally vague and a violation of the Due Process Clause.
6 135 S. Ct. at 2557. Defendant was not sentenced under the ACCA's residual clause; he
7 was sentenced based on the career offender enhancement provision of the Sentencing
8 Guidelines. Nonetheless, Defendant argues that *Johnson*'s holding is applicable, because
9 the ACCA's residual clause is identical in language to Section 4B1.2's residual clause.
10 However, on March 6, 2017, the Supreme Court ruled that *Johnson*'s holding does not
11 extend to the Sentencing Guidelines, in so far as "the advisory Guidelines are not subject
12 to vagueness challenges under the Due Process Clause."² *Beckles v. United States*, 137 S.
13 Ct. 886, 197 L. Ed. 2d 145 (2017). Under *Beckles*, "it plainly appears from the face of
14 the motion" that Defendant "is not entitled to relief." See Rule 4(b) of the Rules
15 Governing Section 2255 Proceedings for the United States District Courts. As such,
16 Defendant's 2255 motion must be denied.

17 **CERTIFICATE OF APPEALABILITY**

18 Rule 11(a) of the Rules Governing Section 2255 Proceedings for the United States
19 District Courts provides that "[t]he district court must issue or deny a certificate of
20 appealability when it enters a final order adverse to the applicant." A defendant must
21 obtain a certificate of appealability before pursuing any appeal from a final order in a
22 Section 2255 proceeding. See 28 U.S.C. § 2253(c)(1)(B). When the denial of a Section
23 2255 motion is based on the merits of the claims in the motion, a district court should
24 issue a certificate of appealability only when the appeal presents a "substantial showing

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27 ² Subsequent to the issuance of *Beckles*, Defendant requested thirty (30) days in which to review the
28 Supreme Court's decision and submit a reply brief. See Doc. No. 88. Defendant also asked the Court to
defer ruling on his 2255 motion in the interim. *Id.* More than thirty days has passed, and to date,
Defendant has not filed any additional briefing.

of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). The defendant must show that reasonable jurists could debate whether the issues should have been resolved differently or are “adequate to deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 483 (2000), quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983), superseded on other grounds by 28 U.S.C. § 2253(c)(2); *see also Mendez v. Knowles*, 556 F.3d 757, 771 (9th Cir. 2009). Because Defendant has not made a substantial showing of the denial of a constitutional right, and because the Court finds that reasonable jurists would not debate the denial of Defendant’s motion, the Court declines to issue a certificate of appealability.

CONCLUSION

Based on the foregoing, the Court **DENIES** Defendant's 2255 motion. The Court **DECLINES** to issue a certificate of appealability. The Clerk of Court is instructed to enter judgment in accordance herewith and close the related civil case.

IT IS SO ORDERED.

DATE: April 17, 2017

Michael M. Anello
HON. MICHAEL M. ANELLO
United States District Judge